

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2414-CR

Cir. Ct. No. 2012CF6007

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DOUGLAS RAY SEUELL, JR., A/K/A DOUGLAS RAY SEVELL, JR.

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
REBECCA F. DALLET, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Douglas Ray Seuell, Jr., a/k/a Douglas Ray Sevell, Jr., *pro se*, appeals from an order denying his motion for sentence modification. Seuell argues that sentence modification is required because the trial court erroneously applied “the penalty enhancer to the extended supervision portion of

[his] sentence[s].” We conclude that the trial court did not improperly apply the domestic violence penalty enhancer to the two sentences that were imposed. Therefore, we affirm.

BACKGROUND

¶2 Pursuant to a plea bargain, Seuell pled guilty to disorderly conduct and substantial battery, both with the domestic abuse repeater penalty enhancer. *See* WIS. STAT. §§ 947.01, 940.19(2), 939.621(1)(b) & (2) (2011–12).¹ The trial court sentenced Seuell to twelve months of initial confinement and fifteen months of extended supervision for the disorderly conduct, and it imposed a consecutive sentence of two years of initial confinement and two years of extended supervision for the substantial battery. The trial court also ordered Seuell to pay the DNA surcharge.

¶3 After a postconviction lawyer was appointed, Seuell filed a motion to vacate the DNA surcharge. The trial court granted the motion. Seuell did not file a notice of appeal or pursue other postconviction remedies with the assistance of his lawyer.

¶4 Subsequently, Seuell filed a *pro se* motion to “vacate and modify” his sentences, alleging that the trial court had unlawfully applied the domestic violence repeater penalty enhancer to the extended supervision portion of both of

¹ All references to the Wisconsin Statutes are to the 2011–12 version unless otherwise noted.

his sentences. The trial court denied Seuell's motion in a written order, concluding that both of the sentences were proper under the applicable statutes.²

DISCUSSION

¶5 At issue is whether Seuell's sentences comport with statutory requirements. This presents a question of law that we review *de novo*. See *State v. Murdock*, 2000 WI App 170, ¶18, 238 Wis. 2d 301, 312, 617 N.W.2d 175, 180 (“The interpretation and application of statutes present questions of law that we review *de novo*.”) (italics added).

¶6 Our analysis of Seuell's sentences is guided by our recent decision in *State v. Lasanske*, 2014 WI App 26, 353 Wis. 2d 280, 844 N.W.2d 417, which was decided on February 26, 2014, nearly two months after Seuell filed his appellate brief in this case. *Lasanske* addressed all of the cases Seuell cited in his brief.

¶7 The State's brief, which was filed after *Lasanske* was released, argues that *Lasanske* supports its position that Seuell's sentences are proper. Seuell did not file a reply brief and, therefore, he did not refute the State's argument that this case is governed by *Lasanske*. Unrefuted arguments are deemed admitted. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979). Nonetheless, we will briefly explain why we agree with the State that Seuell's sentences comport with the applicable statutes and case law.

² The trial court also denied Seuell's motion on procedural grounds. In its brief, the State indicates that it “does not argue that Seuell's claim is barred.” We will not address whether Seuell's motion was procedurally barred.

¶8 We begin with *Lasanske*'s explanation of bifurcated sentences:

With very few exceptions, whenever a court sentences a person to “imprisonment in the Wisconsin state prisons” for a felony or a misdemeanor, the court must impose a bifurcated sentence—which is made up of a period of confinement in prison followed by a term of extended supervision. WIS. STAT. § 973.01(1)–(2). An order imposing a bifurcated sentence must comply with the procedure set forth in four paragraphs specifying the structure of the bifurcated sentence—the total length, the confinement portion, the penalty enhancement, and the minimum and maximum terms of extended supervision. Sec. 973.01(2)(a)–(d).

Lasanske, 2014 WI App 26, ¶5, 353 Wis. 2d at 283–284, 844 N.W.2d at 419 (footnote omitted). *Lasanske* held that “[t]here is a difference in the procedure for applying penalty enhancers in felony and misdemeanor cases” and went on to discuss those procedures. See *id.*, 2014 WI App 26, ¶¶5–11, 353 Wis. 2d at 283–287, 844 N.W.2d at 419–421.

¶9 *Lasanske* explained the proper approach in felony cases as follows:

With felonies, the sentencing court starts under WIS. STAT. § 973.01(2)(a) with the applicable maximum term of imprisonment for the felony in question under the state statutes, setting aside the penalty enhancement, to determine the confinement portion of the bifurcated sentence under § 973.01(2)(b) and extended supervision under § 973.01(2)(d). The term of confinement in prison may not be less than one year, and, except as provided in para. (c) (the penalty enhancement paragraph), the confinement portion is subject to a set maximum, set forth in para. (b), for each classified felony. Sec. 973.01(2)(b) 1–9. For other crimes, the confinement portion may not exceed “75% of the total length of the bifurcated sentence.” Sec. 973.01(2)(b)10. Similarly, the maximum extended supervision depends upon whether a felony is classified or unclassified, § 973.01(2)(d), and for each classified felony the extended supervision portion is subject to a set maximum. Sec. 973.01(2)(d) 1–6. Finally, all bifurcated sentences are subject to the requirement that the extended supervision portion “may not be less than 25% of the length

of the term of confinement in prison imposed under par. (b).” Sec. 973.01(2)(d).

Only after determining an appropriate bifurcated sentence in compliance with the limits imposed by WIS. STAT. § 973.01(2)(b) and (d) does the court add a penalty enhancer to a felony sentence. *See* § 973.01(2)(c)1. Under subd. (2)(c)1., the court adds the enhancer to the confinement portion, which increases the total length of the bifurcated sentence by the same amount.

Lasanske, 2014 WI App 26, ¶¶6–7, 353 Wis. 2d at 284–285, 844 N.W.2d at 419.

¶10 When we apply *Lasanske*’s discussion to this case, we conclude that the trial court imposed a proper sentence for the substantial battery. Substantial battery is a Class I felony that carries a maximum sentence of three years and six months of imprisonment, and the maximum term of initial confinement is one year and six months. *See* WIS. STAT. §§ 940.19(2), 939.50(3)(i), 973.01(2)(b)9. The domestic abuse repeater penalty enhancer increases the maximum penalty by two years. *See* WIS. STAT. § 939.621(2).³ Thus, the trial court was permitted to: impose a term of initial confinement of one year and six months, impose a term of extended supervision of two years, and then increase the term of initial confinement by six months based on the domestic violence penalty enhancer. The resulting sentence of two years of initial confinement and two years of extended

³ WISCONSIN STAT. § 939.621(2) provides in its entirety:

If a person commits an act of domestic abuse, as defined in s. 968.075(1)(a) and the act constitutes the commission of a crime, the maximum term of imprisonment for that crime may be increased by not more than 2 years if the person is a domestic abuse repeater. The victim of the domestic abuse crime does not have to be the same as the victim of the domestic abuse incident that resulted in the prior arrest or conviction. The penalty increase under this section changes the status of a misdemeanor to a felony.

supervision was proper. *See Lasanske*, 2014 WI App 26, ¶¶6–7, 353 Wis. 2d at 284–285, 844 N.W.2d at 419.

¶11 Turning to misdemeanor convictions, *Lasanske* explained that penalty enhancers are applied differently when it is the penalty enhancer itself “that transforms the misdemeanor jail sentence into a term of imprisonment in the state prisons, which then must be bifurcated per [WIS. STAT.] § 973.01.” *See Lasanske*, 2014 WI App 26, ¶8, 353 Wis. 2d at 285, 844 N.W.2d at 420. The court continued:

Determining the bifurcated structure of a misdemeanor begins under WIS. STAT. § 973.01(2)(a) with the applicable maximum term of imprisonment for the misdemeanor, plus additional imprisonment authorized by any applicable penalty enhancement statute. The confinement portion “may not exceed 75% of the total length of the bifurcated sentence.” Sec. 973.01(2)(b)10. The extended supervision portion “may not be less than 25% of the length of the term of confinement in prison imposed under par. (b).” Sec. 973.01(2)(d).

Lasanske, 2014 WI App 26, ¶9, 353 Wis. 2d at 286, 844 N.W.2d at 420.

¶12 Applying that analysis here, we conclude that Seuell’s sentence for the disorderly conduct was proper. The maximum sentence for disorderly conduct, a Class B misdemeanor, is ninety days in jail. *See* WIS. STAT. §§ 947.01, 939.51(3)(b). The domestic abuse repeater penalty enhancer increases the maximum penalty by two years and “changes the status of a misdemeanor to a felony.” WIS. STAT. § 939.621(2). Thus, the maximum sentence in this case was two years and three months. The trial court imposed a sentence of twelve months of initial confinement and fifteen months of extended supervision. This sentence is proper because the initial confinement portion did not exceed “75% of the total length of the bifurcated sentence” and the extended supervision portion of the

sentence was not “less than 25% of the length of the term of confinement in prison.” See *Lasanske*, 2014 WI App 26, ¶9, 353 Wis. 2d at 286, 844 N.W.2d at 420 (quoting WIS. STAT. § 973.01(2)(b)10. & (2)(d)).

¶13 In summary, we conclude that the trial court did not improperly apply the domestic violence penalty enhancer to either the substantial battery or disorderly conduct convictions. Therefore, we affirm the trial court’s order denying Seuell’s motion for sentence modification.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

